Supreme Court, U.S.
FILED

981460 MAR 12 1999

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

ARBITER SYSTEMS, INC., *Petitioner*

v

Richard J. Danzig, SECRETARY OF NAVY, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVEN D. POWELL
Counsel of Record
SCHWARTZ & POWELL
6633 Telephone Road, Ste. 150
Ventura, California 93003
(805)658-8955

Of Counsel:
DAVID L. McDUFFIE
Attorney at Law
6633 Telephone Road, Ste. 150
Ventura, California 93003
(805)658-8955

65pp

Lorraine Mitchell Legal Briefs

732 E. WASHINGTON BOULEVARD
LOS ANGELES, CALIFORNIA 90021-3088
(213) 747-5631 • FAX: (213) 747-5843

CONTENTS REPRODUCED FROM FURNISHED PRETYPED COPY.

QUESTION PRESENTED FOR REVIEW

1. In the context of Navy Research and Development contracts, is the Navy equitably estopped *in pais* to defeat recovery of foreseeable promised overhead when the Navy promised recapture of this overhead during contract negotiations?

LIST OF PARTIES AND RULE 29.6 LISTING

The parties to the proceedings are the petitioner, ARBITER SYSTEMS, INC. and the respondent Richard J. Danzig, SECTRETARY OF NAVY.

Petitioner ARBITER SYSTEMS, INC. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.6.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ii

LIST OF PARTIES iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT 12

CONCLUSION 20

APPENDIX A-1

TABLE OF AUTHORITIES

Cases

Advanced Materials, Inc. v. Perry,
108 F.3d 307 (Fed. Cir. 1997) 14, 15

American Electronic Laboratories, Inc. v. United States, 774 F.2d 1110
(Fed. Cir. 1985)..... 13, 14, 19, 20

Heckler v. Community Health Service of Crawford County,
467 U.S. 51 (1984)..... 13, 14, 18, 19

Office of Personnel Management v. Richmond,
496 U.S. 414 (1990)..... 18

RMI, Inc. v. United States,
800 F.2d 246 (Fed. Cir. 1986) 12

United States v. Georgia Pacific Company,
421 F.2d 92 (9th Cir. 1970) 18, 19

Statutes

28 U.S.C. 1254(1)..... 1

41 U.S.C. 601..... 1

41 U.S.C. 607..... 1

The petitioner Arbiter Systems, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit, entered in the above-entitled proceeding on December 15, 1998

OPINIONS BELOW

The Judgment and Opinion of the Court of Appeals for the Federal Circuit was not reported. It is reprinted in the appendix hereto, p. A-1, *infra*.

The Opinion of the Armed Services Board of Contract Appeals is reported at 97-2 BCA ¶29,183 and is reprinted in the appendix hereto, p A-3, *infra*.

JURISDICTION

Jurisdiction of the Armed Services Board of Contract Appeals was invoked by Petitioner pursuant to 41 U.S.C. §601 et. seq., the Contract Dispute Act of 1978. Judgment in the Armed Services Board of Contract Appeals was entered on August 14, 1997.

Jurisdiction of the Court of Appeals for the Federal Circuit was invoked through 41 U.S.C. §607. Judgment in the Federal Circuit was entered December 15, 1998.

The jurisdiction of this Court to review the judgment of the Federal Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Allowable Cost and Payment Clause (Aug. 1996) (FAR Sec. 52.216-7) (ACPC). The complete text of this regulation is reprinted in the Appendix, p. A-25, *infra.*

Limitation of Cost Clause (Apr. 1984) (FAR Sec. 52.232-20) (LOCC). The complete text of this regulation is reprinted in the Appendix, p. A-32, *infra.*

Limitation of Funds Clause (Apr. 1984) (FAR Sec. 52.232-22) (LOFC). The complete text of this regulation is reprinted in the Appendix, p. A-35, *infra.*

STATEMENT OF THE CASE

This petition seeks review from an adverse decision of the United States Court of Appeals for the Federal Circuit. Judgment of the Federal Circuit was entered December 15, 1998. The Federal Circuit affirmed an adverse decision of the Armed Services Board of Contract Appeals (the BOARD) entered on August 14, 1997, denying contractor's claim for reimbursement of $761,443.10 owed on two contracts between appellant and appellee.

In 1986, four new owners puchased petitioner Arbiter Systems, Inc. (ARBITER). Two of the new owners, WILLIAM DICKERSON and BRUCE ROEDER, testified before the BOARD in his matter.

When the new owners took over at ARBITER, the company was in the final stages of performance on a

research and development contract with the U.S. Navy (NAVY), Contract N00123-83-D-0081 (0081).

When the new owners took over at ARBITER, the company was an 8 to 10 man company, including the new owners. It was housed in old barracks at the Santa Barbara airport. ARBITER's overhead was very small.

On September 12, 1986, the parties entered into cost-plus-fixed-fee contract No. N00123-87-D-0126 (0126) for electrical and electronic metrology calibration standards and equipment development and testing. Contract 0126's estimated cost was $4,358,426.00; fixed fee was $348,674.00; and the total estimated cost plus fixed fee was $4,707,100.00. Contract 0126's period of performance was October 1, 1986 to September 30, 1987, with two option years to September 30, 1989.

On June 30, 1987, the parties entered into cost-plus-fixed-fee contract No. N00123-87-D-0279 (0279) for microwave and electromagnetic metrology calibration standards and equipment development. Contract 0279's estimated cost was $9,248,583.00; fixed fee was $1,017,344.00; and the total estimated cost plus fixed fee was $10,265,927.00. Contract 0279's period of performance was June 22, 1987 to June 21, 1988 with two option years to June 21, 1990.

Both Contract 0126 and 0279 incorporate by reference the FAR 52.232-20 Limitation of Cost (LOCC) clause (April 1984). Both Contract 0126 and 0279 also incorporate by reference the FAR 52.232-22 Limitation of Funds (LOFC) clause.

Both Contracts also incorporate the following specific language:

> If, at any time, 85% of either the estimated cost or estimated level of effort specified in the delivery order is reached, and it appears that additional funds and/or level of effort is required to complete performance of the delivery order, the Contractor shall promptly notify the Ordering Officer in writing. Such notification shall include the cost and level of effort expended and that required to complete performance. The Government shall have the right to amend the delivery order accordingly.

Finally, both Contracts incorporate by reference the FAR 52.216-7, Allowable Cost and Repayment Clause (ACPC).

Messrs. DICKERSON and ROEDER of ARBITER were neophytes to government contracts at the time ARBITER negotiated and entered into contracts 0126 and 0279.

When ARBITER submitted its bids on the contracts that became 0126 and 0279, it was in the final stages of performing contract 0081 for the NAVY. Contract 0081 was a small effort, generating about $850,000.00 in revenues. Contracts 0126 and 0279 were continuations of work begun under contract 0081.

Although contracts 0126 and 0279 were continuations of ARBITER's earlier work on contract 0081, the subject contracts called for significantly greater amounts of labor and material than did contract 0081.

Because the proposed new contracts were significantly larger in scope than ARBITER's earlier contract 0081, ARBITER knew it would be unable to perform the new contracts in its old facility. ARBITER knew it would need to add staff and support. ARBITER made a good faith effort to project accurately in its 0126 and 0279 bid proposals its indirect costs, overhead and G&A, on the basis of the anticipated costs associated with the increased workload, not upon "historical rates" associated with 0081. ARBITER's estimates of indirect costs that it would incur were close to the amounts the Defense Contract Audit Agency (DCAA) determined upon completion of contract performance were actually incurred.

Nevertheless, the NAVY rejected ARBITER's estimated indirect costs. DCAA had done a pre-award audit and projected indirect costs based upon ARBITER's historical rates. Ms. GAYLE WALKER, the Government's Contracting Officer, told ROEDER that ARBITER must use the DCAA rates to bid. DCAA remained responsible for review of these low rates during contract performance before they could be changed upward.

Prior to the execution of contract 0126 and contract 0279, representatives of ARBITER and the NAVY met to negotiate terms. BRUCE ROEDER and MICHAEL FLATTEN represented ARBITER; GAYLE

WALKER and MICKEY BELTRAN represented NAVY. GAYLE WALKER was the Contracting Officer (CO).

During the negotiation, ARBITER told the NAVY it could not agree to the contract at its historical indirect rates approved by DCAA.

The NAVY told ARBITER it would be paid its actual costs regardless of DCAA provisional rates because the proposed agreement was a cost-plus-fixed-fee contract.

Ms. WALKER, the Contracting Officer, responded to Mr. ROEDER's statement that ARBITER would lose money at DCAA's artificially low rates and could not therefore enter into the contract by saying:

> "What do you care what they [the rates] are in the contract, you're reimbursed for all your costs anyway. This is a cost plus fixed fee contract. . . . All your expenses are reimbursed anyway. So what do you care what you've got in your bid. It really doesn't mean anything anyway."

The above statement was never contradicted by Ms. WALKER during the hearing with the BOARD.

When the NAVY told ARBITER it would reimburse its indirect costs, it did not qualify its representation subject to cost and/or funding limitations. From this meeting, ARBITER thought DCAA rates were required for pricing the contract but expected to bill and be paid its actual indirect costs. Both DICKERSON and

ROEDER believed that any notices of cost overruns required by the contracts was required to be based upon the artificially low DCAA provisional rates and did not, therefore, believe during performance that ARBITER would incur cost overruns.

ARBITER entered into Contract 0126 relying on the NAVY's representation that the Government would pay ARBITER its actual indirect costs, regardless of DCAA provisional rates.

The NAVY's pre-contract representation caused ARBITER to believe it had no risk of loss on the 0126 or 0279 contracts.

ARBITER would not have entered into either contract 0126 or 0279 had Ms. WALKER not represented the NAVY would reimburse its costs.

When ARBITER completed contract 0081, during performance of 0126 and 0279, the DCAA final audit showed ARBITER's costs exceeded fund limitation ceilings on seven delivery orders. After underbilling for overhead and G&A under 0081, ARBITER received payment for its total indirect costs even though these costs exceeded both provisional DCAA rates and even funding limitations. A 1987 post-performance audit by DCAA revealed money was owing ARBITER and the Government -- by BETTY CORE, the Ordering Officer for contract 0081 and also contracts 0126 and 0279 -- unilaterally issued contract modifications to seven delivery orders to add money "due to under-billing the Government" in November of 1989. ARBITER expected

this procedure would be followed with respect to 0126 and 0279.

The NAVY increased the funding limit on the seven contract 0081 delivery orders so as to pay ARBITER 100% of its costs.

The NAVY's act of increasing contract 0081 funding limits after the fact reinforced ARBITER's reliance on Ms. WALKER's representation that NAVY would reimburse its costs.

DCAA had exclusive responsibility for indirect cost rates during contract performance. ARBITER tried unsuccessfully to bill the NAVY its actual indirect costs, but the NAVY rejected any invoices with indirect costs at rates other than DCAA approved rates. ARBITER requested DCAA modify its rates on numerous occasions to reflect actual costs but DCAA did not cooperate. DCAA failed to audit annually ARBITER's costs on 0126 and 0279.

The NAVY required ARBITER to bill at the following provisional indirect rates, as approved by DCAA:

	Overhead	G&A
1986-1987 (0126)	121.51%	24.00%
1986-1987 (0179)	105.50%	20.00%
1988-1991 (Both)	142.00%	9.00%

ARBITER's actual indirect rates for the same period, as determined by DCAA were as follows:

	Overhead	G&A
1986	107.53%	21.11%
1987	150.64%	14.21%
1988	126.99%	14.45%
1989	128.22%	23.43%
1990	142.25%	44.28%
1991	186.63%	90.01%

DCAA failed to perform its "annual" audits of ARBITER's costs in performing contracts 0126 and 0279 on an annual basis. In fact, DCAA failed to perform audits of ARBITER's costs for work performed during 1987, 1988, 1989, 1990, or 1991 until ARBITER's performance was completed on both contracts.

ARBITER invoiced the NAVY for costs beyond 85% of funded amounts of delivery orders in contracts 0126 and 0279. The NAVY paid these invoices beyond 85% of the funded amounts. ARBITER's costs did not exceed the total estimated cost of either 0126 or 0279.

In 1991, ARBITER submitted final vouchers to DCAA, which finally did an audit. DCAA concluded ARBITER had once again, as in 0081, underbilled its indirect costs and directed ARBITER to obtain contract modifications (previously under 0081 unilaterally issued) for payment. In October of 1991, appellant requested increases in delivery order estimated costs to cover ARBITER's actual expenses but was rebuffed on the basis of failure of notice. In April, 1992, ARBITER requested contract modifications -- like those on contract 0081 -- to fund its underbilled costs but was refused when the Government interposed notification requirements of the

limitation clauses to avoid payment. In May of 1993, after ARBITER again requested recapture and reimbursement of the promised indirect costs, the NAVY refused to pay.

In November 1993, ARBITER claimed $84,994.39 under 0126 and $676,448.71 under contract 0279. In January 1994, the Contracting Officer finally denied the claims.

SUMMARY OF ARGUMENT

The BOARD's decision, affirmed by the United States Court of Appeals for the Federal Circuit, was clearly erroneous and contrary to law in that it engrafted the principle of foreseeability onto the law of equitable estoppel. In so doing, the BOARD negated the entire doctrine of equitable estoppel.

The evidence establishes that the NAVY is estopped from asserting and interposing the limitation clauses of contracts 0126 and 0279 so as to deny ARBITER's claim for underbilled indirect costs.

NAVY induced ARBITER to enter into the contract by promising ultimate DCAA audit recapture of costs regardless of provisional or interim rates. ARBITER relied upon the Contracting Officer's promise to pay all indirect costs and would not have performed but for that reliance, which was ratified when the Government retroactively funded and paid predecessor contract 0081's underbilled indirect costs.

Because the Government knew of the underbilling, because its conduct induced reliance,

because ARBITER was not aware that no implied funding of the underbilling was intended by the NAVY's promise and conduct, and because ARBITER relied upon the Government's conduct to its detriment, the NAVY is estopped to assert ARBITER's failure to notify of any cost overrun.

That failure, of course, is exactly what the NAVY told ARBITER not to worry about in the first place and the NAVY should not be allowed to contradict its representation of ultimate recapture and reimbursement of indirect costs based on DCAA audit, especially in light of DCAA's failure to perform these audits in a timely manner, and retroactive funding of contract 0081.

The decision below, however, would ignore and eviscerate the established legal principles of equitable estoppel with its unfounded use of the notion of "foreseeability." The BOARD held ARBITER's foreseeability of cost overruns immunized NAVY from equitable estoppel

Foreseeability establishes estoppel; it does not defeat it. One cannot expect that which one cannot foresee. The BOARD, in its ruling, clearly errs as a matter of law. This error constitutes a departure from the accepted and usual course of judicial proceedings, and is also in conflict with other circuits.

Further, the decision below affects the ability of the Armed Services to contract with citizens of these United States, and therefore has national implications and ramifications.

ARGUMENT

I. By Utilizing the Principle of Foreseeability, the Lower Court Completely Eviscerates the Doctrine of Equitable Estoppel *In Pais*.

The essence of the BOARD's decision, affirmed by the Federal Circuit, is that ARBITER may not recover because it could and did foresee that it was underbilling the NAVY, notwithstanding NAVY's direction to do so, and despite NAVY's promise to ARBITER that it would recapture the underbilled indirect cost and G&A upon final audit of DCAA.

By suggesting that "foreseeability" bars recovery, the BOARD and the Federal Circuit confound separate areas of law -- (1) recovery based upon an estoppel and (2) recovery based upon a Contracting Officer's improper exercise of discretion in funding unforeseen cost overruns.

The lower court apparently relied upon *RMI Inc, v. United States*, 800 F.2d 246 (Fed. Cir. 1986) for the proposition that because ARBITER's cost "overrun" was reasonably foreseeable ARBITER should be denied recovery. But *RMI*, *supra*, is inapposite to the case before this Court; *RMI* involved no promised recapture of underbilled indirect rates. *RMI, supra*, dealt with the Contracting Officer's improper exercise of discretion in funding unforeseen cost overruns. ARBITER here was told not to worry about reimbursement of its indirect costs. *RMI* simply is inapplicable to the facts before this Court.

"Foreseeability" is irrelevant to the law of equitable estoppel. The burden of establishing an estoppel against the Government is already heavy without interposing the concept of foreseeability. As this Honorable Court has pointed out:

> "[H]owever heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present."

Heckler v. Community Health Serv. of Crawford County, 467 U.S. 51, 61 (1984).

The traditional elements of an equitable estoppel were adopted by the Federal Circuit in *American Electronic Laboratories, Inc. v. United States*, 774 F.2d 1110 (Fed. Cir. 1985). An estoppel is properly asserted against the Government when the following four conditions are met:

(a) the Government must know of the overrun;

(b) the Government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor has a right to believe the conduct in question was intended to induce performance;

(c) the contractor must not be aware that no implied funding of the overrun was intended by the conduct in question; and

(d) the contractor must rely on the Government's conduct to its detriment.

American Electronic Laboratories, Inc., supra, 774 F. 2d at 1113.

Though not expressing the elements in identical language as the court in *American Electronic Laboratories, Inc.*, this Court in *Heckler, supra,* does discuss the elements necessary to establish equitable estoppel. *Heckler*, 467 U.S. at 59.

Blatantly absent from the "traditional elements" set forth is the notion that "foreseeability" will prevent an estoppel from being established against the Government. Yet this is exactly what the lower court has engrafted onto the equitable estoppel doctrine. Such a notion has the effect of eviscerating the doctrine. As previously stated above, foreseeability establishes estoppel; it does not defeat it. One cannot expect that which one cannot foresee.

The lower court also appears to rely on *Advanced Materials, Inc. v. Perry*, 108 F.3d 307 (Fed. Cir. 1997) to deny ARBITER's entitlement to recovery in this action but this reliance is likewise misplaced. In *Advanced Materials*, *supra*, the Federal Circuit found no estoppel against the Government where its Contracting Officer stated that the Government was "considering" allocating additional funds to a contract, statements "merely

indicat[ing] a willingness by the Government to consider increasing the costs if the facts established the contractor's entitlement thereto." *Advanced Materials*, *supra*, 108 F.3d at 310.

In the case before this Honorable Court, *Advanced Materials* does not apply. Here, the Contracting Officer said at the very outset of negotiations:

> "What do you care what they [the rates] are in the contract, you're reimbursed for all your costs anyway. This is a cost plus fixed fee contract. . . . All your expenses are reimbursed anyway. So what do you care what you've got in your bid. It really doesn't mean anything anyway."

NAVY said this responding to ARBITER's protest that it could not enter into the contract at the DCAA provisional rates, and was never contradicted by the NAVY.

The evidence clearly shows that an estoppel has been established against NAVY to assert the notice requirements in the contracts.

(a) The Government had knowledge.

During contract negotiations, ROEDER protested to Contracting Officer WALKER that ARBITER would be unable to complete its performance of the contracts proposed without exceeding cost or funding limitations because the DCAA provisional overhead and G&A rates were much too low. ROEDER told WALKER and

BELTRAN he did not intend to sign the proposed contract because ARBITER would lose money at DCAA rates. Therefore, WALKER and the Government knew the provisional rates would cause a cost overrun if ARBITER agreed to the NAVY's terms. They encouraged and indeed insisted that ARBITER underbill its indirect rates on the understanding of recapture and reimbursement later.

(b) Government's conduct intended to induce performance or contractor's right to believe such intention.

Despite this information, WALKER nevertheless assured ROEDER that ARBITER should not be concerned by the provisional rates because DCAA would calculate the contractor's actual rates upon completion of its performance on a contract. WALKER told ROEDER, "What do you care what [the rates] are in the contract, you're reimbursed for all your costs anyway." Even if Ms. WALKER and the Government by some stretch of the imagination did not intend to induce performance with those words, ROEDER and ARBITER had a right to believe the words were so intended, and did so believe.

(c) Contractor not aware implied funding not intended.

ARBITER was ignorant that NAVY had no intention of reimbursing its costs subsequent to the contractor's acceptance of the NAVY's contract terms. After WALKER's promise to ROEDER, and the NAVY's payment to ARBITER of amounts exceeding funding limitations on contract 0081, ARBITER could not have

known WALKER or NAVY had no intention of approving its DCAA approved final invoices.

Indeed, the BOARD below found ARBITER "expected to be able to bill at its higher rates and be paid its actual indirect costs." When ARBITER's initial billings were rejected because the indirect costs were not billed at DCAA provisional rates, ARBITER expected to be reimbursed post-performance as it had been for contract 0081.

(d) Contractor detrimental reliance.

Finally, ARBITER incurred substantial continued performance costs in detrimental reliance on WALKER's assurance that overhead and G&A costs would be reimbursed based upon final DCAA audit.

The BOARD below found reliance in addition to expectation. The BOARD found that ROEDER agreed to contracts 0126 and 0279 in reliance on NAVY's representation that ARBITER would receive reimbursement of its actual indirect costs. The BOARD also found that ARBITER did not expect any risk of loss on the contracts.

This matter, therefore, is a paradigmatic example of estoppel against the Government.

Yet, notwithstanding the clear evidence supporting estoppel, the lower court interposed the notion that because ARBITER foresaw the cost overruns, the estoppel is defeated. The Federal Circuit Court of Appeals eviscerated the law of estoppel without regard to

its own, this Honorable Court's, or other Circuit's precedents. This Honorable Court has never adopted a bright line test that equitable estoppel will not run against the government. *Heckler,* 467 U.S. 51; *Office of Personnel Management v. Richmond*, 496 U.S. 414, (1990). Foreseeability does not defeat equitable estoppel *in pais*.

The lower court's decision effectively exempts the Government from the requirements of morals and justice. See *United States v. Georgia Pacific Company*, 421 F.2d 92, 103 (9th Cir. 1970).

In *Georgia Pacific, surpra*, an owner of timberlands agreed in 1934 to donate certain lands if boundaries of national forest were extended to include the lands. The boundaries were subsequently extended, but then retracted so as to exclude these lands. The Government allowed the owner's successor in interest to manage the timberlands at a very considerable expense and add a great deal of value to them. Then, the Government brought suit for specific performance of the 1934 contract in 1967. The court quoted Mr. Justice Holmes as follows: "Men must turn square corners when they deal with the Government." 421 F.2d at 103. The court, however, went on to say,

> "but it is clear that the Government is itself becoming more reasonable by permitting those corners to be rounded when reason and logic demand that the Government be held to the same standard of rectilinear rectitude that it demands from citizens."

Id.

The *Georgia Pacific* court held the Government was not entitled to immunity from equitable estoppel. Allowing the Government to claim an immunity from estoppel is in fact allowing them to claim an exemption from the requirements of morals and justice. *Id.*

This is what the lower court does in its analysis of foreseeability. Foreseeability is the essence of equitable estoppel. ARBITER's foreseeability is what raises the issue of equitable estoppel. One cannot expect what one does not foresee. ARBITER's foreseeability does not defeat equitable estoppel.

II. The Lower Court's Decision Conflicts with this Court's Requirements for the Establishment of Equitable Estoppel, and Conflicts with the other Circuits.

The Federal Circuit's judgment in affirming the BOARD's decision is in conflict with the well founded requirements for the establishment of equitable estoppel against the government this Honorable Court has set forth. See *Heckler v. Community Health, supra.*

One can search endlessly, yet the "foreseeability" idea which the lower court bases its finding on simply is not present in the law of equitable estoppel *in pais.*

Additionally, other circuits simply do not allow "foreseeability" to defeat estoppel. *United States v. Georgia Pacific Company, supra*, 421 F. 2d at 96.

Most striking is the fact that the lower court's ruling conflicts directly with its own case law. *American Electronic Laboratories, Inc., supra,* 747 F.2d at 1113. *American Electronic Laboratories, Inc.* does not support the contention that a contractor's awareness will exempt the Government from equitable estoppel.

The lower court's ruling is directly at odds with this Honorable Court and other circuits. Plenary review by this Court is essential.

CONCLUSION

For these and various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

STEVEN D. POWELL
Counsel of Record
SCHWARTZ & POWELL
6633 Telephone Road, Ste. 150
Ventura, California 93003
(805)658-8955

Of Counsel:
DAVID L. McDUFFIE
Attorney at Law
6633 Telephone Road, Ste. 150
Ventura, California 93003
(805)658-8955

APPENDIX

APPENDIX A:

United States Court of Appeals
For the Federal Circuit: Judgment A-1

APPENDIX B:

Opinion by Administrative Judge Todd A-3

APPENDIX C:

Allowable Cost and Payment Clause
(Aug. 1996) (FAR Sec. 52.216-7)
(ACPC) A-25

APPENDIX D:

Limitation of Cost Clause (Apr. 1984)
(FAR Sec. 52.232-20) (LOCC)..... A-33

APPENDIX E:

Limitation of Funds Clause (Apr. 1984)
(FAR Sec. 52.232-22) (LOFC) A-36

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-1095, -1096, -1097

ARBITER SYSTEMS, INC.,

Appellant,

v.

Richard J. Danzig, SECRETARY OF NAVY,

Appellee.

Judgment

ON APPEAL from the ARMED SERVICES BOARD OF CONTRACT APPEALS

in CASE NO(S). 47403 and 47404

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (RICH, NEWMAN, and LOURIE, Circuit Judges).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED: DEC 15 1998

s/ Jan Horbaly
Jan Horbaly, Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

DEC 15 1998

JAN HORBALY
CLERK

ARMED SERVICES BOARD OF CONTRACT APPEALS

Appeals of	)	
	)	
Arbiter Systems, Inc.	)	ASBCA Nos. 47403
	)	and 47404
Under Contract Nos.	)	
N00 123-87-D-0 126	)	
N00123-87-D-0279	)	

APPEARANCE FOR THE APPELLANT:

Steven D. Powell, Esq.
Schwartz & Powell
Ventura, CA

APPEARANCES FOR THE GOVERNMENT:

Arthur H. Hildebrandt, Esq.
Navy Chief Trial Attorney
Douglas P. Hinds, Esq.
Stephen R. O'Neil, Esq.
Assistant Directors

OPINION BY ADMINISTRATIVE JUDGE TODD

These appeals involve claims in the total amount of $761,443 for indirect costs incurred by appellant Arbiter Systems, Inc. (Arbiter) in the performance of two cost-plusfixed-fee contracts. The contracting officer denied reimbursement of appellant's cost overruns. Only entitlement is before us for decision.

FINDINGS OF FACT

1. On 12 September 1986, the parties entered into negotiated cost-plus-fixed-fee Contract No. N00 123-87-D-0 126 (contract -0 126) for electrical and electronic metrology calibration standards and equipment development and testing for the U.S. Navy. The total estimated cost plus fixed fee was $4,707,100, The period of performance was 1 October 1986 to 30 September 1987, with two option years to 30 September 1989. (ASBCA No. 47404, R4 (hereinafter R4, -0126), tabs 1, 1 (a))

2. On 30 June 1987, the parties entered into negotiated cost-plus-fixed-fee Contract No. N00123-87-D-0279 (contract -0279) for microwave and electromagnetic metrology calibration standards and equipment development. The total estimated cost plus fixed fee was $10,265,927. The period of performance was 22 June 1987 to 21 June 1988, with two option yews to 21 June 1990. (ASBCA No. 47403, R4 (hereinafter R4, -0279), tabs 1, 1 (a))

3. Section B, "Supplies or Services and Prices," in each of the contracts contained the clause, "Fee Adjustment Due to Variations in the Level of Effort and Payment of Fee." This clause provided in pertinent part:

> Nothing herein shall be construed to alter or waive any of the rights or obligations of either party pursuant to the clause hereof entitled "Limitation of Costs" or "Limitation of Funds" either of which clause as incorporated herein shall apply to each individual delivery order issued hereunder.

(R4, -0126, tab I at 3; R4, -0279, tab 1 at 3)

4. Section H, "Special Contract Requirements," included the procedures for issuance of written delivery orders for all work to be performed under each contract. The total amount of all delivery orders was not to exceed the estimated cost and fixed fee or level of effort set forth in the contract. (R4, -0126, tab I at 20-23; R4, -0279, tab 1 at 1316) This section provided in pertinent part:

> The contractor shall notify the Ordering Officer if any apparent difficulties MA regard to performance according to the terms of the order axe anticipated or any time difficulties in performance arise. Each delivery order shall be deemed to include therein the clause Limitation of Costs or Limitation of Funds, which is a part of this contract, and such clause shall be applicable to each delivery order individually.

(Id. at 22; id. at 15; emphasis in original.)

5. The next paragraph in Section H. provided:

> If, at any time, 85% of either the estimated cost or estimated level of effort specified in the delivery order is reached, and it appears that additional funds and/or level of effort is required to complete performance of the delivery order, the Contractor shall promptly notify the Ordering Officer in writing. Such notification shall include the cost and level of effort expendedand **the** required to

complete performance. The Government shall have the right to amend the delivery order accordingly.

(Id.)

6. Section I, "Contract Clauses," incorporated by reference, "with the same force and effect as if they were given in full text," the standard clauses, Limitation of Cost (APR 1984) (FAR § 52.232-20) (LOCC), Limitation of Funds (APR 1984) (FAR § 52.232-22) (LOFC), and Disputes (APR 1984) (FAR § 52.233-3) (Id. at 24; id. at 18; tr. 1/100). The standard clause, Order of Precedence (JAN 1986) (FAR § 52.215-33), was incorporated by reference in contract -0279 and added to contract -0 126 by Modification No. P00005, dated 13 January 1988 (id. at 72; id. at 18).

7. The owners of Arbiter who testified for appellant, Mr. William J. Dickerson and Mr. Bruce Roeder, had no experience with Government contracting before acquiring the company on 28 January 1986 # 116, 113-15). In 1986, Arbiter employed eight to ten people, including its four new owners, in an old, very small rented facility at the Santa Barbara, California airport (tr. 1/46-47). At the time of the acquisition, Arbiter was performing a similar research and development contract for the Navy, Contract Ito. N00123-83-D-0081 (contract -0081). Contract -0081 was a relatively small effort that generated only about $850,000 in revenues for appellant. The subject contracts were continuations of the contract -0081 work. (Tr. 1/38, 126, 2/64)

8. When appellant reviewed the solicitations for the two subject contracts, it knew it would need to expand its activities substantially with a new facility, administrative staff, new computer systems, and capital equipment to be able to perform the work. (Tr. 1/48-53) Appellant made a good faith effort to project accurately in its proposals its indirect costs on the basis of the anticipated increased work. Appellant estimated overhead rates of 125 and 135 percent for the different contracts and a G&A rate of 24 percent. (AR4, tabs 3 1, att. A, 34, att. A; tr. 115 5, 119-25, 13 6)

9. The Defense Contract Audit Agency (DCAA) conducted a pre-award audit and established appellant's indirect cost rates for billing purposes based on historical booked rates involving appellant's performance of contract -0081 and analysis of projected labor costs. The provisional overhead rate was 121.51 percent, and the G&A rate was 24 percent for the bake year for contract -0 126. The provisional overhead rate was 105.5 percent, and the G&A rate was 20 percent for the basic year for contract -0279. DCAA recommended these rates to the contracting officer for contract negotiations. DCAA was responsible for review of these rates before they could be changed during contract performance. (R4, -0126, tab 1 (a) at 7; 114, -0279, tab I (a) at 20-21; tr. 1/45, 201, 2/47, 3/56)

10. The Government did not accept appellant's proposal for contract -0126 because its indirect cost rates were higher than the DCAA provisional rates. On 10 September 1986, Mr. Roeder and Mr. Michael Flatten, another of appellant's owners and President at the time, represented appellant at a negotiating meeting with Ms.

Gayle Walker, the contracting officer, and Ms. Mickey Beltran, the contract negotiator for the Navy. Appellant objected to the Navy's position because the work would cost more than the total estimated cost of the contract, and the company would lose money if it billed at the lower DCAA rates. Mr. Roeder told the contracting officer that appellant could not enter into the contract if it included the DCAA rates. (R4, -0126, tab 1(a) at 9; tr. 1/125, 128, 130, 133-35, 194)

11. The contracting officer told appellant that appellant was entitled to reimbursement for its actual costs (tr. 1/ 141, 20 1). Mr. Roeder recalled Ms. Walker's replies to appellant's concerns at the negotiating meeting as follows:

> What do you care what they [the rates] are in the contract, you're reimbursed for all your costs anyway. This is a cost-plus-fixed-fee contract.
>
> [A]ll your expenses are reimbursed anyway. So why do you care what you've got in your bid. It really doesn't mean anything.

(Tr. 1/134, 135) From this meeting appellant recognized that the DCAA rates were required to be the basis for pricing the contract, but expected to be able to bill at its higher rates and be paid its actual indirect costs (tr. 1/57-58, 61-62, 141, 183). Ms. Walker did not remember what happened at the meeting (tr. 1/ 194). There was no mention in the meeting of limitations on reimbursement of appellant's costs (tr. 1/146-47, 158, 174-75, 183, 185).

Ms. Walker has never intended to waive the LOFC (tr. 1/197).

12. Mr. Roeder agreed to contracts -0 126 and -0279 in reliance on the Government's representation that appellant would receive reimbursement of its actual indirect costs (tr. 1/64, 135, 137). Appellant did not expect any risk of loss on the contracts (tr. 1/56, 65, 148-50).

13. The Government issued 21 delivery orders under the contracts that were negotiated by Ms. Betty Core, the ordering officer at the Navy's Metrology Engineering Center. Each of the orders had a funding limitation. The stated amount of an order was described "TOTAL NOT TO EXCEED." In addition, the schedule in each delivery order included a clause, "MONETARY LIMITATION," which directed the contractor not to incur expenditures in excess of the amount of the order and stated that the Government was not obliged to reimburse any amount expended in excess of the amount of the order unless the amount was increased by formal modification. (R4, -0126, tabs 2 through 11; !R4, -0279, tabs 2 through 12) Appellant did not question the applicability of these funding limitations before its receipt and performance of the delivery orders.

14. Ms. Core advised all contractors, including Mr. Flatten, that they were not to work beyond the not to exceed amount of the incremental funding of a delivery order or they would be working at their own risk (tr. 2/8-9, 30-3 1). Mr. Roeder acknowledged that appellant received this advice from Ms. Core (tr. 1/175, 185).

15. Initially appellant billed at As actual indirect cost rates, but the Government rejected invoices that did not match the DCAA rates (tr. 1/65-66, 137-38). On I I March 1988, DCAA notified appellant that it considered an overhead rate of 142 percent and a G&A rate of 9 percent acceptable for interim billing purposes for 1988. Appellant was not precluded from further revising the interim rates if DCAA found that circumstances warranted a change. These rates remained in effect during performance of the contracts. (AR4, tab 2; tr. 1/89, 105-08, 178) Appellant was billing at the following DCAA-approved rates:

	Overhead	G&A
1986-1987 (contract -0126)	121.515%	24.005%
1986-1987 00279)	105.5%	20.001%
1988-91 (-0126 & -0279)	142.001%	9.000%

(Finding 9, supra; AR4, tab 2)

16. After underbilling for overhead and G&A under contract -008 1, appellant received payment for its total indirect costs incurred in the total amount of $14,198 even though they had exceeded the initial contract funding limitations. In 1987, a DCAA audit after completion of contract -0081 determined that actual overhead and G&A costs were higher than the amounts that had been billed on seven delivery orders. The Government issued unilateral contract modifications, dated 26 November 1989, to add funding in specified amounts "due to under-billing the Government." (AR4, tab 232; tr. 114, 36, 57, 138-40, 2/31-33) Appellant

expected this procedure would be followed with respect to contracts -0 126 and -0279 (tr. 1/57, 105, 142).

17. Appellant's actions during performance of the contracts show that it understood the applicable funding limitations. Appellant sent notices to the Government when its expenses on delivery orders reached the 75 or 85 percent level of funding (R4, - 126, tabs 9(d), 11 (e), 1 1(f); R4, -0279, tabs 5(e), 5(g), 6(g), 7(c), 8(f), 9(g), I I (f); AR4, tabs 22, 24, 27, 28, 78, 241). As an example of these notices, appellant's letter, dated 9 November 1987, addressed to Ms. Core, stated:

> Pursuant to Federal Acquisition Regulations, this letter is to inform you that the expenditures and vouchered costs for Delivery Order 4M-04 for the above referenced contract has [sic] reached 75% of the total costs allowable value.

(AR4, tab 27) Appellant's letters did not state that additional funds were needed or include statements of a revised estimated cost to complete a delivery order (Id.). Appellant was aware that working beyond the funding limitation of a partially funded delivery order was at As own risk (tr. 1/ 162-64, 170). Appellant notified the ordering officer when it reached funding limitations on some of these delivery orders and suspended work until additional incremental funding was provided. Appellant stopped work when all funds were expended if the Government did not provide additional funding. (R4, -0279, tabs 6(f), 9(d), 9(e), 9(f), I 0(c))

18. The Government warned appellant of the contract requirement to notify the administrative contracting officer (ACO) of any anticipated cost overruns and that appellant must strictly adhere to the requirements of the LOFC. The ACO sent letters, dated 17 August 1989, and 26 October 1989, which specifically stated in pertinent part:

> As a matter of guidance in considering the amount of costs incurred or total cost under the contract, consideration must be given to overhead adjustments in determining whether an overrun will exist.

(R4, -0126, tab 6(c); R4, -0279, tab 8(a); Gov't exh. 1; tr. 1/95-96) The ACO also advised appellant that its notice letters did not comply with the terms of the LOCC. By letter, dated 17 November 1987, request was made for a revised notification letter because appellant's notice had not provided a revised estimate of the total cost of performing the order. (AR4, tab 239) Mr. Dickerson, appellant's chief executive officer, responded on 21 November 1987, with appellant's interpretation that a provision in the contract schedule (finding 5) superseded the LOCC under the Order of Precedence clause. Appellant did not state -die amount of an anticipated cost overrun. Appellant requested advice if its contract interpretation was incorrect. (AR4, tab 240) Appellant restated its interpretation of the contract in writing to the ACO on later occasions (AR4, tabs 28, 78, 253). The Government did not respond directly to any of appellant's requests for confirmation of its interpretation of the limitation clauses in the contracts. Mr. Dickerson testified that he believed the LOCC and LOFC requirements had

been nullified (tr. 1/100). Both Messrs. Dickerson and Roeder testified that they believed that notice of cost overruns was required to be based on DCAA provisional indirect cost rates. They did not consider during performance that appellant would incur cost overruns. (Tr. 1/ 102-03, 159)

19. Appellant requested that DCAA modify its provisional indirect cost rates on numerous occasions so that its billings would more accurately reflect its actual costs, but did not obtain the cooperation it desired from DCAA. In one letter, dated 5 March 1990, to DCAA, appellant specifically requested modification of its billing rates. For fiscal year 1990, appellant was requesting a 130.5 percent rate for overhead and a 28.66 percent rate for G&A. (R4, -0279, tab 2(h); ARA, tab 25 1; tr. 157, 14 645)

20. DCAA did not perform an audit of appellant's cogs on contracts -0126 and -0279 on an annual basis # 1/76, 146). DCAA's audit that determined final rates for 1986 was completed on 16 August 1988 (AR4, tab 23 1); Or 1987 and 1988 on 12 September 1991 (R4, -0126, tabs 14, 15); and for 1989, 1990, and 1991 on 18 December 1992 (ARA, tab 246). The DCAA audited rates were:

	Overhead	G&A
1986	107.535%	21.111%
1987	150.64%	14.21%
1988	126091%	14.45%
1989	128121%	23.43%
1990	142.251%	44.281%
1991	186531%	90.01%

(R4, -0126, tabs 14, 15; AR4, tab 246) Appellant accepted and agreed to all the DCAA audits (AR4, tab 228; tr. 1/32, 83-84, 15 1).

21. Appellant invoiced the Navy for costs beyond 85 percent of the funded amounts. The Navy paid appellant's invoices beyond 85 percent of the funded amounts, but not beyond the funding limitations in the delivery orders. (R4, -0126, tab 14)

22. When DCAA received appellant's final vouchers and conducted an audit, it found that appellant was billing significantly more dollars than authorized by the contract terms. By letter, dated 12 September 199 1, DCAA required appellant to correct the invoices or submit copies of executed contract modifications authorizing appellant to exceed the contract amounts. (R4, -0126, tab 2(a))

23. Appellant's estimates of indirect costs that it would incur were close to the amounts that DCAA determined upon completion of contract performance were actually incurred (tr. 1/ 12 1).

24. On 9 October 199 1, appellant requested increases in delivery order estimated costs to fund its actual expenses (R4, -0126, tabs 2(b), 3(c), 4(b), 5(c), 6(c), 7(b), 8(c); IN, -0279, tabs 2(i), 3(e)). On 5 February 1992, the Government denied appellant's requests for increased funding because appellant had failed to love notice of is need for additional funds before completing performance of the delivery orders and no supplemental funds were available (R4, -0126, tabs 2(c), 2(d), 3(d), 5(e), 6(g), 7(d), 8(e), R4, -0279, tabs 2(k), 3(g)).

25. By letters dated 13 April 1992, appellant requested contract modifications to provide additional funding noting that it had not exceeded the estimated costs until the DCAA audit and claiming, "[t]here would have been no possible way to request additional funds in the allowed time, as we were not audited in a timely matter [sic]" (R4, -0126, tabs 2(e), 3(f), 4(d), 5(f), 6(h), 7(e), 8(f), R4, -0279, tabs 2(l), 3(h)).

26. The Government made a determination on 9 October 1992, not to increase funds for appellant's delivery orders because, as stated in its letter to appellant, at no time during contract performance was the Government notified of potential cost overruns or when cogs had been expended at the 85 percent level. Both the LOCC and the LOFC were applicable and required the contractor to record actual costs as they were incurred and maintain an adequate accounting system. Since appellant had failed to follow the proper procedures, particularly with respect to the recording of actual indirect cost rates, the Government would not reimburse additional costs incurred in excess of the funded amounts. (R4, -0279, tab 15)

27. On 5 January 1993, the ACO notified appellant of the final indirect cost rates on the contracts and that final invoices should be submitted for payment (AR4, tab 245; tr. 1/152-53). Appellant submitted its final vouchers to DCAA, but they were returned without processing Ipart because reimbursement was requested in excess of the contract funding limitations. Appellant's costs did not exceed the total estimated cost of either contract. (R4, -0126, tab 15; tr. 1/153-57) Appellant

submitted another set of invoices for the balance of funds left on the delivery orders and has received reimbursement for allowable costs incurred up to the funding limitations of the delivery orders (tr. 1/ 15 7, 173,179).

28. On 26 February 1993, Mr. Dickerson sent a letter to Ms. Ellen Polen, the contracting officer who then had responsibility for both contracts, to request reimbursement of all DCAA-approved costs. Appellant took the position that the LOCC and LOFC did not apply to justify withholding payment of DCAA-approved costs because the Navy had waived the notice requirement. Appellant asserted that since the Navy continued to pay invoices in excess of 85 percent of a delivery order funding limitation even though appellant had failed to give notice, it waived the LOCC and LOFC. (R4, -0126, tab 14; tr. 1/32-3 6)

29. On 13 May 1993, Ms. Polen responded to Mr. Dickerson's letter with a detailed explanation of the Government's position denying appellant's request for reimbursement. The letter recommended that appellant file a claim in accordance with the Disputes clause if it decided to pursue the matter further. (R4, -0126, tab 16; in 1/ 15 8)

30. On 17 November 1993, appellant submitted a claim under contract -0126 for $84,994.39 and a claim under contract -0279 for $076,448.71 (R4, -0126, tab 17; R4, -0279 tab 191 The final decisions of the contracting officer, dated 14 January 1994, denied the claims (R4, -0126, tab 18; 114, -0279, tab 20). Appellant filed these timely appeals (R4, -0126, tab 19; R4, -0279, tab 2 1).

DECISION

Under the limitation clauses in the contracts, appellant was not obligated to incur, and the Government was not obligated to reimburse, costs in excess of the estimated cost., specified in the delivery orders. The contracts required the contractor to give notice to the contracting officer whenever it had reason to believe during performance that costs would exceed a certain percentage of the authorized delivery order funds. It is well established that the contracting officer has the discretionary authority to fund and pay costs a contractor incurs above a contract's cost ceiling. General Electric Co. v. United States, 188 Ct. Cl. 620, 412 F.2d 1216 (1969). It is an abuse of that discretion not to fund an overrun when it was impossible for the contractor to determine that an oven-an would occur and the sole reason for the refusal is the lack of contractor notice of the potential overrun. General Electric Co. v. United States 194 Ct. Cl. 678, 440 F.2d 420 (1971). Appellant has the burden of proving that the cost overrun was not reasonably foreseeable and that it was impossible to obtain advance approval and contract funding from the contracting officer before incurring costs in excess of the contract's cost ceiling. RMI, Inc. v. United States 800 F.2d 246 (Fed. Cir. 1986).

Appellant maintains that the LOCC and LOFC do not apply to the contracts (app. reply br. at 23). Appellant contends that the specific clauses included in the contracts to implement the LOCC and LOFC create an ambiguity that should be construed against the Government (see finding 18; app. br. at 32-34). Appellant relies on one

specific paragraph[1] in the contract that does not provide for appellant's right to stop work if additional funds are not provided. The LOCC and LOFC require a contractor to give notice when it has reason to anticipate a potential cost overrun and to specify the cost required to complete performance. We see no inconsistencies or ambiguities in the several limitation clauses in the contracts and delivery orders. Appellantcontinued to have the option to stop work if it provided notice of an impending overrun and did not receive additional funding. We conclude the contract language is plain in obligating the contractor to provide notice of possible cost overruns.

Appellant asserted its interpretation during performance of the contracts, but we do not accept appellant's argument that the Government's failure to provide clarification in response to requests from appellant was a breach of duty that would have the effect of requiring us to interpret the contract language in favor of appellant. The contract language was plain. Furthermore, appellant did not rely on its interpretation, but referred to applicable federal regulations and even stopped performance of delivery orders when all funds were expended as provided for by the limitation clauses (finding 17). It is also insignificant that the LOCC and the LOFC were incorporated by reference. Appellant's contract interpretation is without merit.

---

[1] Appellant refers only to the second paragraph from Section H of the contract that is quoted in finding 5, supra, in support of its argument and has not acknowledged that the LOCC and the LOFC are specifically made applicable in the immediately preceding paragraph of the contract.

Appellant argues that the belated DCAA audits caused Arbiter's costs to exceed funding limitations (app. br. at 32, app. reply br. at 4). We reject the suggestion that appellant had to wait for DCAA audits to know its actual indirect costs. Appellant was required to maintain an accounting and financial reporting system adequate to apprise it of its actual overhead and G&A expenses as they were incurred during ferformance. Titan Corporation ASBCA No. 49865, 97-1 BCA ~ 28,679; Optonetics, Inc., ASBCA Nos. 17074, 17834, 73-2 BCA ¶ 10, 174 at 47,899. The DCAA audit did not cause an overrun by retroactive changes to rates being used in appellant's billings. There is no indication that appellant could not have determined its actual incurred costs during performance. Appellant appears to have been aware of As actual overhead and G&A expenses, having attempted to bill at actual rates at the beginning of contract performance, having made a reasonably accurate estimate of what was finally incurred, and knowing that it was underbilling its actual costs, having tried to obtain revisions of the DCAA provisional rates. Appellant had reason to believe the costs it would incur would exceed the funding limitations of its delivery orders and cannot claim that the amounts were unforeseeable.

Appellant has relied for its assertion that the LOCC and LOFC do not apply on a representation made by the contracting officer at the negotiation meeting before entering into the contract that its actual indirect costs would be paid without regard to the DCAA provisional rates used for billing. Appellant maintains that this representation was reinforced by the Government's modification of contract -0081 to allow payment of actual

overhead and G&A costs that exceeded contract funding limitations after a DCAA audit. Appellant also relies on the Government's payment of invoices beyond the 85 percent funding level. Appellant argues that its disregard of: the LOCC and LOFC during performance of the contract is- conduct which evidences the parties' understanding of the contract requirements. To the contrary, we have concluded that the contract language is plain, and correspondence between the parties shows us that both parties recognized the applicability of the funding limitation clauses to the delivery orders (M.. findings 17, 18). In addition, prior retroactive funding of overruns on another contract did not bind the Government to fund future overruns on these contracts. Each claim for funding stands on its own. Textron Defense Systems ASBCA Nos. 47352, 47950, 96-2 BCA ¶ 28,332; Planning & Human Services, Inc. ASBCA No. 44013, 94-1 BCA ¶ 26,376.

We have considered whether assurances of reimbursement given by the contracting officer at the negotiation meeting constituted a waiver of the LOCC and LOFC. Since Ms. Walker's statements at the negotiation meeting did not concern actual costs in excess of the funding of the delivery orders (finding 11), they do not constitute a waiver of the LOFC. In Lansdowne Steel & Iron Company, Inc. ASBCA No. 41110, 95-1 BCA ~ 27,506, a similar assertion of waiver of the LOFC by the contracting officer was rejected by the ASBCA In Dynamic Concepts, Inc., ASBCA No. 44738,93-2 BCA '125,689, relied on by appellant in support of an alleged waiver, the contracting officer paid a contractor's invoices with knowledge of a cost overrun and the contractor's continuing performance of the contract, and the

Government received the benefit of the contractor's performance. This conduct was held to have waived the notice and written authorization requirements of the LOFC. In the instant appeals, the Government was not made aware of impending cost overruns and made no payments in excess of the funding limitations. The Government knew at the time of the negotiation meeting that the DCAA rates, when used in appellant's billings, were likely to cause a cost overrun, but during contract performance did not receive information about potential cost overruns. The Government did not encourage continued performance when it knew appellant had reached a funding limitation and cannot be held to have waived the limitation clauses.

Appellant further urges the Board to End that the Government is estopped by its conduct from invoking the contract limitation clauses to deny payment of its actual DCAA-approved indirect costs that exceeded the funding limitations in the delivery orders. Appellant bears the burden of proving that the Government acted in such a way that it should be estopped from asserting the LOCC or LOFC. Cal-Tron Systems, Inc. ASBCA No. 49159, 97-1 BCA ¶ 28,841. Four elements must be present to establish an equitable estoppel:

(1) the party to the estoppel must know the facts, i.e., the Government must know of the overrun; (2) the Government must intend that the conduct alleged to have induced continued performance will be acted on, or the contractor has a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, i.e., that no implied

funding of the overrun was intended by the conduct in question; (4) the contractor must rely on the Government's conduct to its detriment.

Hughes Aircraft Corp., ASBCA No. 24601, 83-1 BCA ¶ 16,396, at 81,516.

Appellant contends that the Government had knowledge of the cost overrun from the negotiation meeting. Since Mr. Roeder did not intend to enter into the contract because of the loss that would be incurred if appellant billed at the DCAA provisional rates, appellant argues it placed the Government on notice of cost overruns. We have found that the Government had no idea of the amounts of any impending cost overruns on the various delivery orders because appellant did not provide that information during contract performance (finding 17). The Government did not intend for appellant to continue performance when the contract was in a cost overrun status and did nothing to encourage appellant to do so. Appellant has failed to establish these essential elements, and its claim of estoppel is denied.

We have reviewed appellant's record evidence and arguments in its briefs to consider its claims and find it unnecessary to discuss its arguments in further detail.

Contractors which during contract performance fail to give the notice specified by the LOCC and LOFC of reasonably foreseeable cost overruns are not entitled to funding of the overrun. Advanced Materials, Inc. v. Perry, 108 F.3d 307, 3 10-11 (Fed. Cir. 1997); RMI, Inc. v. United States supra. Appellant never notified the Government of potential costs that would exceed the

funding limitations of the delivery orders sufficiently in advance to enable the Government to decide whether to increase the funds or permit appellant to stop work. The Government is not obligated to reimburse the contractor for its indirect costs under the circumstances of these appeals. The appeals are denied.

Dated: 13 August 1997

s/Lisa Anderson Todd
LISA ANDERSON TODD
Administrative Judge
Armed Services Board of
Contract Appeals

I concur

s/Alan M. Spector
ALAN M. SPECTOR
administrative Judge
Acting Chairman
Armed Services Board
of Contact Appeals

I concur

s/Mark N. Stempler
MARK N. STEMPLER
Administrative Judge
Vice Chairman
Armed Services Board
of Contract Appeals

I certify that the foregoing is a true copy of the Opinion and Decision of the Armed Services Board of Contact Appeals in ASBCA Nos. 47403 and 47404, Appeals of Arbiter Systems, Inc., rendered in conformance with the Board's Charter.

Dated: 14 AUG 1997

s/Edward S. Adamkewicz
EDWARD S. ADAMKEWICZ

Recorder, Armed Services
Board of Contract Appeals

52.216-7 **Allowable Cost and Payment.**

As prescribed in 16.307(a), insert the following clause:

ALLOWABLE COST AND PAYMENT (AUG 1996)

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(b) *Reimbursing costs.* (1) For the purpose of reimbursing allowable costs (except as provided in subparagraph (2) below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term *costs* includes only–

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for–

(A) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(B) Direct labor;

(C) Direct travel;

(D) Other direct in-house costs; and

(E) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of progress payments that have been paid to the Contractor's subcontractors under similar cost standards.

(2) Contractor contributions to any pension or other postretirement benefit, profit-sharing or employee stock ownership plan funds that are paid quarterly or more often may be included in indirect costs for payment purposes: *Provided*, That the Contractor pays the contribution to the fund within 30 days after the close of the period covered. Payments made 30 days or more after the close of a period shall not be included until the Contractor actually makes the payment. Accrued costs for such contributions that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until the Contractor actually makes the payment.

(3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) below, allowable indirect costs under this contract shall be obtained by applying indirect cost rates established in accordance with paragraph (d) below.

(4) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to the Government shall be disregarded for purposes of cost-reimbursement under this clause.

(c) *Small business concerns.* A small business concern may be paid more often than every 2 weeks and may invoice and be paid for recorded costs for items or services purchased directly for the contract, even though the concern has not yet paid for those items or services.

(d) *Final indirect cost rates.* (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2) The contractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by the Contracting Officer, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by agency procedures, to the cognizant audit activity proposed final indirect cost rates for that period and supporting cost data specifying the contract and/or subcontract to which the rates apply. The proposed rates shall be based on the

Contractor's actual cost experience for that period. The appropriate Government representative and Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(3) The Contractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify (i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) and periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(e) *Billing rates.* Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates–

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Quick-closeout procedures.* Quick-closeout procedures are applicable when the conditions in FAR 42.708(a) are satisfied.

(g) *Audit.* At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

(h) *Final payment.* (1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than one year (or longer, as the Contracting Officer may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to the Government any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by the Government. Reasonable expenses incurred by the Contractor for

securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor under undefinitized contract actions. A *contract action* is any action resulting in a contract, as defined in subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the changes clause, or funding and other administrative changes. This limitation shall apply to the costs incurred, as computed in accordance with paragraph (a) of this clause, and shall remain in effect until the contract action is definitized. Costs incurred which are subject to this limitation shall be segregated on Contractor progress payment requests and invoices from those costs eligible for higher progress payment rates. For purposes of progress payment liquidation, as described in paragraph (b) of this clause, progress payments for undefinitized contract actions shall be liquidated at 80 percent of the amount invoiced for work performed under the undefinitized contract action as long as the contract action remains undefinitized. The amount of unliquidated progress payments for undefinitized contract actions shall not exceed 80 percent of the maximum liability of the Government under the undefinitized contract action or such lower limit specified elsewhere in the contract. Separate limits may be specified for separate actions.

(End of clause)

Alternate I (AUG 1987). If the contract is with a small business concern, change each mention of the progress payment and liquidation rates excepting paragraph (k) to

the customary rate of 85 percent for small business concerns (see 32.501-1), delete subparagraphs (a)(1) and (a)(2) from the basic clause, and substitute the following subparagraphs (a)(1) and (a)(2):

(a) *Computation of amounts.* (1) Unless the Contractor requests a smaller amount, each progress payment shall be computed as (i) 85 percent of the Contractor's total costs incurred under this contract whether or not actually paid, plus (ii) progress payments to subcontractors (see paragraph (j) below), all less the sum of all previous progress payments made by the Government under this contract. Cost of money that would be allowable under 31.205-10 of the Federal Acquisition Regulation shall be deemed as incurred costs for progress payment purposes.

(2) Accrued costs of Contractor contributions under employee pension plans shall be excluded until actually paid unless–

(i) The Contractor's practice is to make contributions to the retirement fund quarterly or more frequently; and

(ii) The contribution does not remain unpaid 30 days after the end of the applicable quarter or shorter payment period (any contribution remaining unpaid shall be excluded from the Contractor's total costs for progress payments until paid).

Alternate II (AUG 1987). If the contract is a letter contract, add paragraphs (l) and (m). The amount specified in paragraph (m) shall not exceed 80 percent

applied to the maximum liability of the Government under the letter contract. Separate limits may be specified for separate parts of the work.

(l) Progress payments made under this letter contract shall, unless previously liquidated under paragraph (b) of this clause, be liquidated under the following procedures:

(1) If this letter contract is superseded by a definitive contract, unliquidated progress payments made under this letter contract shall be liquidated by deducting the amount from the first progress or other payments made under the definitive contract.

(2) If this letter contract is not superseded by a definite contract calling for the furnishing of all or part of the articles or services covered under the letter contract, unliquidated progress payments made under the letter contract shall be liquidated by deduction from the amount payable under the Termination clause.

(3) If this letter contract is partly terminated and partly superseded by a contract, the Government shall allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and shall liquidate each portion under the relevant procedure in subparagraphs (l)(1) and (l)(2) of this clause.

(4) If the method of liquidating progress payments provided in this clause does not result in full liquidation, the Contractor shall immediately pay the unliquidated balance to the Government on demand.

(m) The amount of unliquidated progress payments shall not exceed ....*(specify dollar amount)*.

[48 FR 42478, Sept. 19, 1983, as amended at 52 FR 30078, Aug. 12, 1987; 55 FR 40392, Oct. 3, 1990; 56 FR 29138, June 25, 1991]

52.232-20 **Limitation of Cost.**

As prescribed in 32.705-2(a), insert the following clause in solicitations and contracts if a fully funded cost-reimbursement contract is contemplated, except those for consolidated facilities, facilities acquisition, or facilities use, whether or not the contract provides for payment of a fee. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. *Task Order* or other appropriate designation may be substituted for *Schedule* wherever that word appears in the clause.

LIMITATION OF COST (APR 1984)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that–

(1) The costs the Contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause–

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(End of clause)

52.232-22 **Limitation of Funds**

As prescribed in 32.705-2(c), insert the following clause in solicitations and contracts if an incrementally funded cost-reimbursement contract is contemplated. The 60-day period may be varied from 30 to 90 days and the 75 percent from 75 to 85 percent. *Task Order* or other appropriate designation may be substituted for *Schedule* wherever that word appears in the clause.

LIMITATION OF FUNDS (APR 1984)

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered, the Government's share of the cost if this is a cost-sharing contract, and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid any payable by

the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government or, (2) if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor's corresponding share. The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed upon date, upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract. If the Contractor estimates that the funds available will allow it to continue to discharge its obligations beyond that date, it may specify a later date in its request, and the Contracting Officer may terminate this contract on that later date.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause–

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government or, (ii) if this is a cost-sharing contract, the amount then allotted by the Government, to the contract plus the Contractor's corresponding share, until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

(g) The estimated cost shall be increased to the extent that (1) the amount allotted by the Government or, (2) if this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, exceeds the estimated cost specified in the Schedule. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the

Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

(i) When and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of (1) the amount previously allotted by the Government or, (2) if this is a cost-sharing contract, the amount previously allotted by the Government to the contract plus the Contractor's corresponding share, shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice and directs that the increase is solely to cover termination or other specified expenses.

(j) Change orders shall not be considered an authorization to exceed the amount allotted by the Government specified in the Schedule, unless they contain a statement increasing the amount allotted.

(k) Nothing in this clause shall affect the right of the Government to terminate this contract. If this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(l) If the Government does not allot sufficient funds to allow completion of the work, the Contractor is entitled to a percentage of the fee specified in the Schedule

equalling the percentage of completion of the work contemplated by this contract.

(End of clause)